CTAP CASELAW UPDATES[1] – JULY 2008

By Michael Doggett, Legal Intern and Kelly A. Casillas, Legal Counsel
Community Technical Assistance Program
Montana Department of Commerce

Planning, Zoning and Subdivision Law

Gorton v. Bd. of County Commissioners of Flathead County (Montana District Court, Eleventh Judicial District, Flathead County, July 2, 2008)

Summary: District Court invalidated an extension for preliminary plat approval of a subdivision, when the extension was granted after the three year limitation set forth in the Subdivision and Platting Act and the County's local subdivision regulations..

In April 2003, Flathead County granted conditional preliminary plat approval to the Fox Hills Estates subdivision. Consistent with Section 76-3-610, MCA, and the Flathead County subdivision regulations, the plat approval was valid for three years. Nevertheless, five years after plat approval (two years after expiration of the time limit for requesting extension), the developer sought and the County granted extension of the original preliminary plat approval to allow the developer to complete Phase III of the project.

The district court voided the extension of the plat approval. While it agreed with the County that the agency had the discretion to extend the plat approval, it held that the County had a mandatory requirement to comply with the Subdivision and Platting Act and the agency's local subdivision regulations, which both require that preliminary plat extension occur within three years of the original approval. Because that deadline had passed before the County issued the extension for Phase III, the court issued a writ of mandate ordering the County to return as refused the developer's request for extension of the Fox Hills Estates preliminary plat approval.

Bitterrooters for Planning, et al. v. Bd. of County Commissioners of Ravalli County (Montana Supreme Court, 2008 MT 249, on appeal from the Twenty-First Judicial District, Ravalli County, July 15, 2008.)

Summary: The Montana Supreme Court upheld the district court decision denying plaintiffs an injunction prohibiting the enforcement of an agreement between Ravalli County and Ravalli County developers. Plaintiffs could not establish that: (1) they were entitled to the relief demanded; (2) implementation of the approved Settlement Agreement during the pendency of a determination of the

[1] Disclaimer – This information is not intended to constitute legal advice and should not be relied upon or used as a substitute for consultation with your own, your agency's, or your organization's licensed attorney. These case summaries are provided as technical assistance to county, municipal, state, and regional planning commissions, zoning commissions, parks or recreation boards, community development groups, community action agencies, and similar agencies created for the purposes of aiding and encouraging orderly, productive, and coordinated development of the communities of the state and to assist local governments in discharging their responsibilities.

ultimate issues would cause them great or irreparable injury; or (3) implementation of the Settlement Agreement would violate their rights.

For a summary of the facts of this case, see *CTAP Legal Update February 2008*.

In its decision to uphold the district court, the Montana Supreme Court narrowed its determination on the merits of the case to whether the district court abused its discretion under Section 27-19-201, MCA by not granting a preliminary injunction. To prevail under 27-19-2-1, an applicant must make a prima facie case under one of three statutory provisions. Although the plaintiffs claimed they made a prima facie case under all of the provisions, the Supreme Court disagreed, holding that: (1) they were not entitled to the relief demanded; (2) implementation of the approved Settlement Agreement during the pendency of a determination of the ultimate issues would not cause them great or irreparable injury; and (3) implementation of the Settlement Agreement would not violate their rights.

The Court found that the Board produced important e-mail documents in time for the injunction hearing, that no evidence supported the plaintiffs' conclusions that other relevant documentation was withheld and, furthermore, that the Board provided the Agreement to the plaintiffs as soon as it was available. In addition, the regulations adopted by the emergency interim zoning are only applicable until November 2008, at which time no further subdivision applications will be subject to the Agreement. Therefore, implementation of the terms of the Agreement would not render a future judgment in favor of the plaintiffs ineffectual, since their claim sought to void the Board's approval of the Agreement, not apply the constraints of the interim emergency zoning regulation to the applications at issue.

City of Whitefish v. Bd. of County Commissioners of Flathead County (Montana Supreme Court, on appeal from the Eleventh Judicial District, Flathead County, July 29, 2008)

*Summary: The Montana Supreme Court denied the City's request for an injunction pending appeal to the Montana Supreme Court (*see *CTAP Legal Update June 2008).*

Public Records

Montana Environmental Information Center v. City of Great Falls (Montana District Court, Eighth Judicial District, Cascade County, July24, 2008)

Two power companies entered into an agreement to finance the construction of a coal-fired power plant, the Highwood Generating Station, near Great Falls. A member of the Montana Environmental Information Center (MEIC) requested documents from the City Attorney's office concerning Highwood, including a feasibility study and all contracts and financial agreements between the companies and the City. The City Attorney recommended that the MEIC member go to the City Clerk's office to inspect the documents. Unable to obtain the documents because the City Clerk was on vacation, the member again asked the City Attorney for documents, including all preliminary drafts of agreements between the City and the power

companies. The City Attorney denied access to the preliminary drafts, claiming the City was not required to produce preliminary drafts under Section 2-6-401(2)(ii)(c), MCA.

In response to the denials, MEIC filed a complaint to compel the City to produce all documents in the city's possession related to the Highwood Generating station, and asking that the court find Section 2-6-401(2)(ii)(c), MCA unconstitutional both on its face and as applied. MEIC also requested attorney's fees under the private Attorney General doctrine. The City defended its decision, arguing that: (1) it allowed the Plaintiff access to all public records; (2) it was protecting trade secret privacy interests consistent with *Becky v. Butte-Silver Bow School District No. 1*, 274 MT 131 (1995) and Section 27-8-201, MCA; and (3) that Section 2-6-401(2), MCA, which defines public records of local governments was narrowed by Section 2-5-601(2)(c), MCA, which specifically excludes preliminary drafts from the category of public records. The Montana Newspaper Association filed a brief supporting MEIC; the attorney general chose not to intervene.

The District Court held that even though the preliminary drafts are not a "public record" under Section 2-6-401, MCA, they are nevertheless a "public writing" under Section 2-6-101, MCA, and subject to disclosure as "written acts or records of the acts of the sovereign authority, or official bodies and tribunals, and of public officers, legislative, judicial, and executive." (Section 2-6-101(a-b), MCA.) The Court ordered the City to produce copies of the documents requested by the plaintiffs, and to pay attorney's fees to MEIC.

Environmental Law

The Lands Council, et. al v. McNair, et. al (9th Circuit Court, on appeal from the U.S. District Court for the District of Idaho, July 2, 2008)

Summary: 9th Circuit Court overturned its 2007 ruling granting a preliminary injunction to a group of plaintiffs to halt implementation of the Mission Brush Project, which called for the selective logging of nearly 4,000 acres of forest in the Idaho Panhandle National Forest. The appellate court held its previous decisions misinterpreted the requirements of the National Forest Management Act (NFMA).

In April 2006, the U.S. Forest Service proposed the Mission Brush Area project, in part, to restore the forest to its historic composition, which the Forest Service determined to be more sustainable over time. The specific goals of the Project were to restore forest health and wildlife habitat, improve water quality and overall aquatic habitat, and provide recreation opportunities while reducing negative effects to the ecosystem. The Project included improvements to roads that contribute to sediment in the watersheds; decommissioning roads posing a great risk of contributing to sediment; ensuring that the area has acceptable toilets and wheelchair accessible pathways to toilets; installing a boat ramp and fishing dock; and improving trails. Part of the project called for treating old-growth stands – but not cutting down old growth trees – to maintain existing old growth stands and allocate additional stands for future old growth as they mature. The project was expected to generate 23.5 million board feet of timber to be sold in three timber contracts.

In its decision, the appellate court reversed several of its major holdings in this area of the law, including its injunction in the instant case, noting its reluctance to "act [as] a panel of scientists that instructs the Forest Service how to validate its hypotheses." The Court held that it had previously misconstrued the requirements of the NFMA in *Ecology Center, Inc. v. Austin*, 430 F.3d 1047 (9th Cir. 2005), and *Mineral County v. Ecology Center*, *Inc.*, 127 S. Ct. 931 (2007).

In its reinterpretation of the NFMA, the Court acknowledged that Congress has consistently held that the Forest Service must balance competing demands to manage forest lands for multiple, sustained uses through a "systematic interdisciplinary approach" to achieve integrated consideration of physical, biological, economic, and other sciences. This approach overruled *Ecology Center*, which held that an on-the-ground analysis of the proposed logging site in old-growth forest and post-fire habitats was necessary to ensure compliance with the NFMA. The Court overruled itself for three reasons: (1) they read the requirements in *Lands Council I*, 379 F.3d at 752—that basic scientific methodology required hypothesis and prediction of the model be verified with observation—too broadly by requiring "on-site spot verification" for all subsequent cases, not just the circumstances in *Lands Council I*; (2) they created a requirement not found in any relevant statute or regulation; and (3) they defied well-established law concerning the deference owed to agencies and their methodological choices. As a result of the Court's holding, the denial of the *Lands Council's* injunction was affirmed.

Oregon Natural Desert Association, et. al v. Bureau of Land Management, et. al (9th Circuit Court, on appeal from the U.S. District Court for the District of Oregon, July 14, 2008)

Summary: The 9th Circuit Court struck down a BLM land use plan covering a large portion of Oregon, finding that the agency violated the National Environmental Policy Act of 1969 (NEPA), by failing to: (1) properly analyze the effects of the plan on lands under its control possessing "wilderness characteristics"; and (2) properly analyze management options and failing to analyze grazing and off-road vehicle use throughout the region covered by the plan.

The BLM conducted an initial wilderness review of approximately four and one-half million acres of land in southeastern Oregon, Idaho, and Montana pursuant to 43 U.S.C. § 1782. By November 1980, the BLM had identified 32 Wilderness Study Areas (WSAs) covering approximately 1.3 million acres. A final EIS considering the BLM's recommendations was completed in 1989, which was transmitted to the President in 1991. The President advised permanent preservation for twenty-one of the WSAs, and three thousand acres adjoining WSAs that could be acquired for preservation of wilderness. These recommendations were submitted, without change, to Congress, which has yet to act on them.

In 1995, BLM published notice that it would prepare a resource management plan for the region. Three years after starting the planning process, the BLM announced that the draft Plan and EIS were available for public comment. The Oregon National Desert Association (ONDA) reviewed the draft EIS and Plan, and raised concerns in a letter to the BLM. After these concerns and other public comments were addressed, the BLM made some modifications to its EIS and Plan, and issued both in final form in 2001. ONDA eventually filed suit against the BLM, alleging that it violated the requirements of NEPA for failing to properly analyze the effects of the plan on lands under its control possessing "wilderness characteristics," and failed to

properly analyze management options for grazing and off-road vehicle use throughout the Planning region.

In its decision, the 9th Circuit Court of Appeals agreed with the ONDA on all of its claims, and provided the agency with guidance on how to address these issues on remand. The Court held that the BLM misunderstood the role of wilderness characteristics in its land use planning decisions. Under the FLPMA, the BLM has the authority to manage, even after it has fulfilled its 43 U.S.C. § 1782 duties, and recommend some lands with wilderness characteristics for permanent congressional protection. The Court held that its failure to "entirely decline" to do so was a violation of NPA. On remand, the Court instructed the BLM to address, in some manner in its revised EIS, whether, and to what extent, wilderness values are now present in the planning area outside of existing WSAs and, if so, how the Plan should treat land with such values, up to and including land closures.

Northwest Environmental Advocates, et. al v. U.S. Environmental Protection Agency (9th Circuit Court, on appeal from the U.S. District Court for the Northern District of California, July 23, 2008)

Summary: The 9th Circuit invalidated a federal regulation exempting effluent discharges by ships from portions of the Clean Water Act.

A group of plaintiffs challenged a regulation originally promulgated in 1973 exempting some marine discharges from the permitting requirements of Sections 301(a) and 402 of the Clean Water Act (CWA). That regulation, 40 C.F.R. § 122.3(a), provides that the following vessel discharges into the navigable waters of the United States do not require a permit: discharge of effluent from properly functioning marine engines; discharge of laundry, shower, and galley sink wastes from vessels; and any other discharge incidental to the normal operation of a vessel, including the discharge of ballast water.

The district court concluded that the EPA exceeded its authority under the CWA when it exempted those discharges from permitting requirements, and vacated § 122.3(a), effective September 30, 2008.

The appellate court upheld the decision, noted that after the CWA was originally passed, the EPA had much larger problems than ballast discharges from vessels. Subsequently, many states have taken a closer look at ballast discharges as organisms carried in ballast tanks have been released around the globe, introducing foreign organisms into ecosystems where they had not previously existed. Such organisms without natural predators have clogged the pipes of electric companies and other industries, and many studies have concluded that the losses and control costs run as high as $137 billion a year.

Following *NRDC v. Costle*, 561 F.2d 904 (D.C.Cir.1977), the 9th Circuit Court of Appeals determined that the EPA Administrator does not have the authority to exempt categories of point sources from the permit requirements of the CWA unless by means of a permitting process. Accordingly, the Court invalidated the marine effluent exemptions from the CWA, subjecting all such discharges to the permitting requirements of the CWA.

National Wildlife Federation, et. al. v. Schaefer (U.S. District Court for the Western District of Washington, July 24th 2008)

Summary: A federal district court judge issued a temporary restraining order halting the USDA's Critical Feed Use program on July 8, 2008. The court subsequently reviewed the materials of the plaintiffs, defendants, and other interested parties, and concluded that the plaintiffs met the burden of proving the necessity of a permanent injunction against the BLM because the agency violated the National Environmental Policy Act (NEPA) by acting arbitrarily, capriciously, and unreasonably, when they decided, on the basis of the "Environmental Evaluation" produced, that the Critical Feed Use initiative would have no significant adverse environmental consequences, when they concluded that an environmental assessment (EA) or environmental impact statement (EIS) was not necessary for the agency to allow entities to graze lands enrolled in the Critical Feed Use program. The injunction excluded only those landowners whose applications were approved prior to the TRO, and those whose applications were filed before the TRO, but not yet processed, and subjected both of these categories of landowners to certain restrictions—most notably that the latest a haying and grazing operation can be carried out is November 10, 2008.

Alliance for the Wild Rockies v. U.S. Forest Service (U.S. District Court for the District of Montana, July 30, 2008)

Summary: The Forest Service failed to adequately analyze the impacts of the Northeast Yaak timber harvest project in the Kootenai National Forest insofar as it did not complete a case-specific analysis of the effects of helicopter logging in core grizzly bear habitat. In all other respects, the analysis of the Northeast Yaak Project was adequate.

Plaintiffs claimed the Forest Service's Northeast Yaak Project (the "Project"), located within the Three Rivers Ranger District on the Kootenai National Forest, violated both the Endangered Species Act and the National Forest Management Act. The stated purpose of the Project is to create more diverse and sustainable vegetative conditions, to contribute forest products to the economy, to rehabilitate watersheds, to improve access opportunities for recreation and timber harvest, and to improve the quality of grizzly bear habitat, a listed threatened species. The Project includes harvesting nearly 2,000 acres of timber by ground-based logging, helicopter logging, skyline yarding, and horse logging; the decommissioning of approximately 22 miles of roads to reduce stream sedimentation; berming an additional 12.3 miles of road to protect grizzly bear habitat; and the construction of six temporary roads, totaling less than one mile in length.

Using the standards set forth in the 2004 Forest Plan Amendments for Motorized Access Management within the Kootenai National Forest (the "Access Amendments"), the Forest Service prepared a biological assessment for the Project in 2005, determining that the Project might affect, but was not likely to adversely affect, the grizzly bear. The biological assessment did not discuss the effect of helicopter logging on grizzly bears.

In 2006, in an unrelated proceeding, the district court struck down the Access Amendments for inadequate environmental impact analysis. In response, the Forest Service prepared a new

biological assessment for the Project, this time using standards derived from the 1987 Kootenai National Forest Plan, Fish & Wildlife Service Consultations since 1987, the 1995 Amended Biological Opinion and Incidental Take Statement on the 1987 Kootenai National Forest Plan, and the Selkirk/Cabinet-Yaak Grizzly Bear Areas Interim Access Management Rule Set (the "interim access rules").

With respect to the plaintiff's Endangered Species Act claims, the district court acknowledged that the Forest Service's had appropriately used the best scientific standards available in analyzing the project's impact on the grizzly bear. However, the court held that analysis of the effects of helicopter logging in core bear habitat must be done on a case-by-case basis, and the Forest Service failed to explicitly addressed the effects of helicopter logging associated with the Project in either the biological assessment or the supplement biological assessment.

With respect to the plaintiff's National Forest Management Act (NFMA) claims, the district court rejected the plaintiff's argument that the Forest Service had violated the Kootenai National Forest Plan's requirement of no net increase in total motorized route density by proposing the construction of six temporary roads during implementation of the Project, as the no net increase standard is to be viewed as of project completion.

Takings

West Linn Corporate v. City of West Linn (9th Circuit Court, on appeal from the U.S. District Court for the District of Oregon, July 28, 2008)

Summary: Developer alleged several claims against the City regarding improvements it constructed in anticipation of approval of its development. To resolve the case, the 9th Circuit Court certified questions to the Oregon Supreme Court regarding ripeness and exactions that had yet to be addressed in the state.